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SUBJECT: MIXED FORECAST FOR AMERICAN DEFENDANTS: JAPAN'S PENDING  
SAIBAN-IN SYSTEM

11. (SBU) Summary: In May 2009 Japanese citizens will begin sitting in judgment, alongside career judges, in trials of serious criminal cases. Japanese officials say that citizen participation in the criminal justice system brings Japan into line with other developed nations. There are, however, some significant differences between Japan's hybrid panels and American juries, especially in terms of citizen independence from official influence. Defendants will clearly benefit from the streamlined trial processes accompanying citizen participation. Because foreign defendants attract disproportionate attention in the media, though, the system may prove a mixed blessing for them. End Summary.

Background:

12. (U) Starting in May 2009, Japan will begin trying serious criminal cases before hybrid panels of three career judges and six lay people. The career and lay judges will together consider testimony and other evidence, deliberate over whether a defendant is guilty or not, and decide what punishment to impose. Serious crimes subject to the new system were just 3.2% of the total number of criminal cases heard by Japan's district courts in calendar year 2005. Okinawa's senior prosecutor, Yaichiroh YAMASHIKI, said that his office and the Okinawa District Court were planning, based on past statistics, for

hybrid juries to try approximately 30 criminal cases per year.

¶3. (U) According to Ministry of Justice (MOJ) promotional materials, the goal is to deepen Japanese citizens' understanding of and support for the justice system-and to bring Japan in line with other "developed" nations whose citizens participate in the criminal justice system. Recently Yamashiki explained at a forum sponsored by Okinawa Prefecture that the new system was part of a broader trend towards transparency in criminal justice. Yamashiki stressed that there was nothing wrong with Japan's existing system, per se, but Japan's lack of citizen participation in criminal justice was out of step with other developed countries such as the United States, England, France, and Germany. Yamashiki and our contacts in the local defense bar admitted they did not know how well society would adapt to the new system, and vice versa, and they noted that legislation establishing the system also mandated its review in ¶2012.

#### Screening and selecting lay judges

¶4. (U) Candidates will be drawn from lists of registered voters aged 20 and over. National Diet members, police officers, and members of the Self Defense Forces will be excluded from service. Beginning in December 2008, and no later than December each year thereafter, district courts will randomly draw names from voter registration lists and notify people of their potential candidacy. Those notified will be asked to complete surveys eliciting information about individual exemptions from service, such as being the sole care-taker of an infant or elderly relative, financial hardship, or health problems.

¶5. (U) Approximately six weeks before a trial is scheduled to

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begin, the district court calls 50 lay judge candidates for interviews. The three career judges slated to preside over the case interview candidates, in the presence of the prosecuting and defense attorneys. The attorneys may not question candidates, but each side may reject four without stating a reason, after listening to the interviews. The attorneys have no power to reject candidates for cause; that authority resides in the career judges. Interviews continue until the career judges select six candidates to serve with them, and the remaining candidates are dismissed. The six new lay judges, called saiban-in, are informed of the first trial date and instructed on their duties, including their duty to maintain confidentiality regarding deliberations. They have an

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indefinite duty to refrain from discussing any part of their deliberations. They are permitted, however, to discuss trial proceedings and their general impressions of service as a lay judge.

¶6. (U) We note that the American jury system has fewer automatic exclusions and in the United States, attorneys have the onus of challenging potential jurors. U.S. courts do not exclude people by occupation, though jury candidates employed in the criminal justice system are likely to be stricken from service. While American judges retain final control over who sits in a jury, the attorneys for the parties question the candidates, have a specified number of peremptory challenges, and unlimited challenges for enunciated cause. American judges are loath to retain a candidate as a juror once an attorney has challenged for cause, as it is a near-guaranteed issue on appeal.

#### Pre-trial proceedings

¶7. (U) When trials with saiban-in begin, prosecutors and defense attorneys will be expected to prepare their arguments and evidence in advance of trial. Prosecutor Yamashiki noted that this would be a significant departure from previous practice, when both sides prepared their cases as trials

progressed. Until recently, Japanese criminal trials dragged on at the rate of about one day per month, so there was enough time between hearings for the parties to prepare at their leisure.

¶8. (U) Pre-trial preparation of evidence for live testimony brings Japanese pre-trial procedures closer to those of American courts. Government and defense attorneys postpone the start of a trial until they can complete all evidence collection and preparation. Surprise witnesses are a regular feature in American courtroom dramas, but they are a rarity in real-life courtrooms.

#### Trial proceedings

¶9. (U) As of December 2007 Japanese criminal procedures were revised so that trials run for consecutive days, up to four days per week. Previously, defendants contesting the charges against them could languish in jail for years as they received their monthly day in court. In one recent extreme example, the Tokyo District Court acquitted an American couple of murder after seven years and nine months of trial. According to Prosecutor

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Yamashiki, the MOJ expects that most trials will be started and concluded within three-to-five days. Yamashiki predicted that the most complicated trials would be cut from two-to-three years to three-to-four weeks. The MOJ instituted the compressed system to avoid undue inconvenience to lay judges, but there are also obvious advantages to defendants.

¶10. (SBU) Speedy trial may benefit American and other foreign defendants even more than it does Japanese dependants. Many foreigners are only temporarily in Japan, under the U.S.-Japan Status of Forces Agreement (SOFA) covering U.S. Military personnel, civilians, contractors, and their dependents; on employment contracts with Japanese employers; or as expatriate employees of foreign companies. Mounting a full defense depends on being able to call witnesses, something almost impossible if the defense case doesn't begin until years after the alleged crime occurred. The streamlined trial procedures make it more likely that foreigners on trial will be able to put up a meaningful defense and have family and friends in Japan to support them.

¶11. (U) Until the December 2007 reforms in preparation for the hybrid jury system, prosecutors had witnesses' affidavits read into the record, and there was little live testimony. Throughout 2008, prosecutors and defense attorneys are expected to present more live testimony in evidence during criminal trials in order to accustom themselves (and the career bench) to trying cases before hybrid juries.

¶12. (U) The order of trial will be unchanged. The government presents its case first, then the defense. Prosecutors begin their cases by having the police report read into the record. Prosecution and defense call witnesses for examination and cross examination as they present their cases in turn. Career and lay judges will be able to question witnesses from the bench. Victims, their families, and victim advocates will also be able to question defendants during trials.

¶13. (U) Once the prosecution and the defense finish presenting evidence, the prosecution makes closing remarks, including its sentencing demand. The defense attorney then makes a closing argument. Finally, the chief judge will offer the defendant the opportunity to have the last word before the trial concludes. The defendant may make a statement, or decline to do so.

¶14. (U) We note that Japanese trial procedures and practice will remain significantly different from American procedures and practice. In the United States the burden is on prosecutors and defense attorneys to elicit convincing evidence supporting their cases from the witnesses, generally without assistance from judges. American juries do not question witnesses. Judges are permitted to do so, but rarely do. Victims, their families, and victim advocates would never question defendants in court,

though they may testify during the trial, and at sentencing hearings. Finally, in order to protect defendants' right to refrain from testifying in their own defense, it is unthinkable for American judges to offer defendants a last word at trial.

Deliberation, verdict, sentencing

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¶15. (U) The six lay judges and three professional judges deliberate together during scheduled intermissions during the trial. During deliberations the professional judges explain to their lay colleagues the laws that are relevant to the case and debate the veracity and other qualities of witnesses and evidence. When the trial is concluded, the hybrid panel begins final deliberations.

¶16. (U) Deliberations result in a verdict of guilt or non-guilt, rendered by a qualified majority vote. At least one of the professional judges must be in the majority for the verdict to be valid. If a qualified majority cannot be achieved, the defendant is acquitted. If a qualified majority finds the defendant guilty, the entire panel considers the sentence. The sentence, too, is determined by a majority of the nine-member hybrid panel, and one professional judge must agree to validate the sentence.

¶17. (U) Prosecutor Yamashiki remarked that his office was nervous about the uncertainty that lay judges would insert into a criminal justice system heretofore operated entirely by professionals. He admitted that prosecutors took comfort from the checks the professional judges would still have on lay judge's deliberations.

¶18. (U) The prosecutor put his finger on what is arguably the most significant difference between Japan's pending hybrid jury system and the American jury system: the issue of participating citizens' freedom from outside influence. U.S. criminal procedures strive to keep judges, as finders of law, from affecting the deliberations of juries, as finders of fact. To that end, great care is taken to ensure that juries hear and understand the applicable law and admissible evidence, that the defense and prosecution are apprised of the jury's instructions, and that juries begin deliberating only after all evidence has been presented.

¶19. (U) Our contacts in the Okinawa defense bar have expressed their great frustration with judges ignoring their objections to inadmissible evidence at trial. Judges typically respond to defense objections by saying that they, as experts in the law, will mentally partition the admissible evidence from the inadmissible, and consider only the admissible in rendering their decision. Defense attorneys worry that this attitude will carry over into saiban-in trials, with career judges overly confident that they can keep lay judges from taking inadmissible evidence into consideration.

¶20. (U) During an American criminal trial, should a question arise whether proposed testimony is admissible at trial under the rules of evidence, attorneys will argue to the judge outside of the jury's presence. If an issue is not raised pretrial, an American attorney objects as soon as an objectionable question is asked, not waiting for the answer. One of the first legal aphorisms law students learn is that "you can't un-ring a bell," i.e., once a jury has heard evidence, it cannot forget it, and it will carry that information into its deliberations.

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¶21. (U) Instructions to lay judges on the applicable law will also be subject to the career judge's discretion. In America, jury instructions are established in advance of trial, or in a break between the end of the trial and the start of deliberations. Without the jury present, the government and the

defense argue for their preferred instructions on the record, and the judge decides which instructions the jurors will take with them into deliberations.

¶22. (U) Finally, with very limited exceptions for death penalty cases, American juries do not participate in sentencing decisions. Many U.S. states and the federal justice system have sentencing guidelines and other boundaries on judges' sentencing discretion, but sentencing is still considered part of a judge's purview, based on their experience. Our legal contacts, and many local contacts in business, media and education, have expressed trepidation about lay judges deciding the penalties to impose due to their inability to put specific cases into a broader context. But this is just one of many misgivings about the new system.

Attitudes toward the pending system:

¶23. (U) In February 2007 the Japanese Cabinet Office surveyed registered voters about their attitudes toward the citizen judge system. 80% of the 1,795 respondents said they knew about the system, and almost as many said they wanted nothing to do with the system. 44.5% of respondents said they didn't want to participate, but would if they had to. 33.6% of respondents said they didn't want to participate even if they were required to. 15.2% said they wouldn't mind participating, 5.6% said they wanted to participate, and 1.2% said they weren't sure.

¶24. (U) Most Japanese citizens' objections fall into three categories: invasion of privacy, the burden of secrecy, and financial impact. Privacy concerns begin with the courts having access to voter registration records, continue through having to submit to polling and candidate interviews, and finally being forced during deliberations to share opinions about a trial with eight strangers. On the other hand, the indefinite prohibition on discussing deliberations with outsiders to the process, such as family members, are perceived as punitive. Finally, with a cap on lay judge stipends of about \$100 per day, even three or four days of trial, not to mention several weeks of trial, would overly burden workers, especially the self-employed.

¶25. (U) Prosecutor Yamashiki alluded to similar concerns during his speech, acknowledging that hearing details about the serious crimes to be subject to hybrid panels may be traumatic for lay judges. Undergraduate law students at the University of the Ryukyus told us that participating in a criminal trial would be both educational and exciting. They also wondered whether they should contribute at all, as they had nothing in common with people involved in serious crimes. Members of a local adult continuing education program studying MOJ-developed movie dramatization of a saiban-in trial predicted that, if called to serve as lay judges, they would be afraid of defendants tracking them down and harming them, and would do what they could to avoid actively participating in deliberations.

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¶26. (U) Foreign commentary on the pending system falls into two camps. One holds that the new system will shine daylight into the black box of Japan's criminal justice system. They note that streamlined trials have already resulted in greater media coverage of verdicts and sentences, because the results are released while the public still remembers the incident at issue. The other camp declares the Japanese culture too status conscious for lay judges to have any meaningful impact, and too many elements of the system reinforce their subordination to career judges. While lay judges are saiban-in, directly translated as "justice members," career judges retain the title saiban-kan, or "justice authorities." Career judges retain their robes, their central location on the bench, and power to decide who will serve with them as lay judges, ergo, overwhelming control of the outcomes of trials.

¶3. Comments/Conclusion:

¶27. (U) The new system will inject uncertainty into judicial

proceedings, as lay people enter the court room with the power to question witnesses, decide guilt or lack thereof, and determine the severity of punishment to be imposed. Prosecutors, who are accustomed to near-perfect conviction rates, acknowledge that they are uncomfortable with the prospect of such uncertainty. Even the defense bar, though, admits it cannot predict what changes will come with citizen participation in the system.

128. (SBU) For foreign defendants, the chief foreseeable advantage of the new system is the speedier trial. Defendants will be better able to present a meaningful defense, something practically impossible under the previous system due to the transient nature of their likely foreign witness list. Foreign as well as Japanese defendants will spend less time languishing in jail, with employment and social prospects disappearing, without being convicted of any crime.

129. (SBU) This advantage for foreign defendants accused of crimes is counterbalanced by the risk of discriminatory verdicts and sentencing. Career judges know from years of experience that Japanese defendants commit the vast majority of crimes in Japan. Lay judges, whose exposure to criminal cases is limited to sensationalized headlines, may believe that the first and only foreign defendant they see is just one member of a vast foreign crime wave.

130. (SBU) We think this risk will be particularly heightened in Okinawa. The local daily newspapers pursue an overtly anti-military agenda. They report in great detail on incidents and proceedings involving SOFA-status personnel for crimes that go unmentioned when committed by Japanese citizens. They reinforce their reporting with editorial outrage over the "continuous" victimization of the Okinawan people at the hands of the military. We hope that career judges' influence over lay judges will suffice to counter anti-foreign propaganda, but only time will tell.

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